Nos. 82-898, 82-977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,
Appellants,
and
MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
MINNESOTA EDUCATION ASSOCIATION, and
NATIONAL EDUCATION ASSOCIATION, *et al.*,
Appellants,
v.
LEON W. KNIGHT, *et al.*,
Appellees.

On Appeal From The United States District Court, District of Minnesota, Fourth Division

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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The American Federation of Labor and Congress of Industrial Organiaztions ("AFL-CIO"), a federation of 99 national and international unions with a total membership of approximately 14 million working men and women, file this brief *amicus curiae* with the consent of the parties pursuant to the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The portion of the opinion below at issue in this Court begins from the proposition that if a state establishes a formal system for conferring with selected members of a state college faculty on matters of college goverance, the right of free speech of the faculty members who are not consulted is impaired. Jurisdictional Statement Appendix No. 82-898 ("Jur. St. App."), at A-20 to A-23. Both sets of appellants respond that the First Amendment provides no individual citizen, nor any government employee, any right to be directly consulted by governmental authorities on matters of governmental policy. With that proposition we are in complete agreement, as we have earlier had occasion to inform this Court. *See* Brief *amicus curiae* for American Federation of Labor and Congress of Industrial Relations in *Madison School District v. Wisconsin Employment Relations Commission*, No. 75-946; *id.*, 429 U.S. 167, 179, n. * (Brennan, J., concurring). Because the appellants in this case are ably demonstrating that this underlying premise of the district court opinion is contrary to the First Amendment law in this Court (*see Perry Education Association v. Perry Local Educators Associations*, —— U.S. ——, 51 L.W. 4165 (Feb. 25, 1983)), we do not address further this aspect of the case.

The district court, however, identified an additional First Amendment interest supposedly impaired by the Minnesota statutory scheme here under attack. The Minnesota Community College Faculty Association ("MCCFA"), the designated representative of community college faculty members for purposes of both bargaining over terms and conditions of employment and meeting and conferring on matters of college governance, chose the individuals who met with the college administrators, and, as a matter of practice, appointed only its own members to these meet and confer committees. The district court held that permitting an organization selected by a majority of the affected faculty (Minn. Stat. 179.67; Jur. St. App., at A-91 to A-95) to determine in this manner who will have

the opportunity formally to discuss academic policy questions with the college administrators "infringes the First Amendment associational rights of faculty members who do not desire to join the MCCFA." Jur. St. App. at A-24.[1] The notion, it appears, is that because the opportunity to participate in the selection of, and to serve on the meet and confer committees is "viewed by some [faulty members] as essential to their role on the faculty" (Jur. St. App. at A-51, ¶ IV(A)(5)), faculty members who would not otherwise do so may decide to join MCCFA. The district court thought it "self evident that one's freedom not to join [MCCFA] . . . is seriously impaired" by this "inducement" to associate with MCCFA.

In its Order of April 5, 1983, the district court went even further in perceiving impairment of a constitutional interest in refusing to associate with a private organization. Under that court's original order, all faculty members were permitted to vote for individuals to serve on meet and confer committees. The MCCFA, however, endorsed a slate of candidates. Because the MCCFA did, after all, have the support of more than half the faculty, its slate was chosen. The district court in its April, 1983 Order maintained that this selection procedure as well, although open to all employees, violated the "First Amendment right[] to . . . association" of nonmembers. Again, the district court's point, as we understand it, is that because membership in MCCFA was, under the election rules used, decisive as a practical matter with regard to direct participation in the meet and confer process, there is an "infringement" of the "freedom not to join" MCCFA.

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[1] The "meet and confer" opportunity is in no way in derogation of any individual faculty member's rights to "communicate . . . [his or her] individual views to administrators." Jur. St. App. at A-50, ¶ III(B)(8); *see also* Minn. Stat. § 179.65, Subd. 1; Minn. Stat. § 179.66 Subd. 7, Minn. Laws 1982, ch. 568, § 2.

It may well be that the district court's "right of non-association" analysis is merely the ultimate extention of its basic misconception regarding the First Amendment implications of selective consultation by governmental entities: If in fact college faculty members had a constitutionally cognizable right to discuss academic policy matters with college administrators, it is possible that limiting the exercise of that right to members of a certain private organiaztion could, absent a compelling overriding justification, run afoul of the constitution. *See Carey v. Brown*, 447 U.S. 455; *Madison School District, supra.* On this view, a determination that there is no constitutional right of access to the offices of college officials for the purpose of compelling discussion on matters of academic policy would determine as well that the officials may, as long as their choice is rationally based, prefer for consultation purposes one organization over another, or over disparate individuals, as readily as those officials might choose one individual over another individual. *Perry Education Association, supra*; *City of Charlotte v. Firefighters*, 426 U.S. 283; *Babbitt v. United Farm Workers*, 442 U.S. 289.

On the other hand, the district court may have viewed the supposed impairment of a constitutionally-based right to refuse to join a private organization as independent of any First Amendment protection of the opportunity to discuss academic policy matters with government officials. On this approach, the critical factor would be that access to an attractive government-conferred privilege or benefit depended upon membership in a particular organization; that the benefit happened to be the opportunity to participate in policy discussions would be immaterial. It is to the latter, limited thesis that this brief is directed.

As we show in Part I of the Argument, *infra*, the viability of this aspect of the district court's decision

turns in the first instance upon the nature and strength of the asserted constitutional interest in non-association. While this Court has often affirmed that First Amendment protections include the right to associate with others for the purpose of advancing ideas, the Court has devoted limited attention to the constitutional protection to be accorded the opportunity to remain isolated from such associational activity. As a general matter, however, this Court has implied from affirmative constitutional rights an obverse right only where the policies underlying the Constitution's protection of the affirmative right justify such a result. Thus, the nature of the constitutional protections accorded the interest in nonassociation cannot be discovered by the simplistic strategem of turning inside out the First Amendment's protection of the affirmative right to associate for the advancement of one's political or other views, or by simply applying in a mechanistic way First Amendment precepts developed in that context. As we go on to demonstrate, the primary interest forwarded by the nonassociational right concept is that relating not to the public interchange of ideas forwarded by the protection of associational rights but to the private interest of individuals in their personal integrity and personal beliefs; indeed, there is a tension between the First Amendment policy of enhancing the public dialogue and an asserted right to isolate oneself from expressive activity by others.

In Part II of the Argument, *infra*, we explore the nonassociational rights claim here in the light of the general points stated in Part I. We explain that in this instance the government, though not compelled to do so by the Constitution, by agreeing to listen to what a particular group wishes to discuss has enhanced both the public dialogue and the associational interests of those who are members of the group. The claim here is that the government may not do so because its actions create an inducement to nonmembers who wish to participate in the discussions to join the group. To recognize a

constitutionally-protected right of nonmembers to curb the ability of government in this manner would be to read the Constitution as erecting a *cordon sanitaire* between the government and private associations of its citizens that would stiltify the government's ability to consult with private associations and to increase—through favorable tax treatment, grants and contracts—the ability of such associations to carry out socially-desirable activity. These deleterious effects on the proper workings of the government in a democratic socieyt are themselves sufficient to require rejection of the nonassociational rights claim in this case. Moreover, this Court in *Regan v. Taxation With Representation*, —— U.S. ——, 51 L.W. 4583 (May 23, 1983), recently rejected in the context of claims resting on the affirmative right of free speech a contention analytically indistinguishable from the district court's ruling here. The Court held that there is no infringement of First Amendment rights where the government treats expression by one group favorably, but not speech by another group. As we show, under the approach taken in *Regan*, the interest in nonassociation here asserted, when examined in light of the freedom of belief value which underlies that interest, can certainly fare no better.

ARGUMENT

I

A. (1) This Court has long recognized, and recently several times reaffirmed, that a right to associate with others for purposes of expressive activity inheres in the First Amendment protections of free speech, free press, and free assembly:

> As we so recently acknowledged in *Citizens Against Rent Control v. Berkeley*, —— U.S. ——, ——, 102 S.Ct. 434, 436, 70 L.Ed.2d 492, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." We recognized that "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Ibid.* In emphasizing "the important of freedom of association in guaranteeing the right of people to make their voices heard on public issues," *ibid.*, we noted the words of Justice Harlan, writing for the Court in *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488:
>
> > "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."
>
> [*N.A.A.C.P. v. Claiborne Hardware Co.*, —— U.S. ——, 102 S.Ct. 3409, 3423.[2]]

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[2] As a derivative of the express First Amendment rights, the right of free association does not encompass *all* forms or organization or affiliation; only association for purposes of fostering expressive activity is protected. For example, while

> parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desireable, and . . .the children have an equal right to attend such institutions . . . it does not follow that the *practice* of excluding racial minorities from such institutions is also

Thus, because "[t]he Court has long viewed the First Amendment as protecting a market place for the clash of different views and conflicting ideas" (*Citizens Against Rent Control v. City of Berkeley*, —— U.S. ——, 102 S.Ct. 434, 436), the Court has long recognized as well the right of individuals to join together more effectively to compete in that "market place."

(2) The scope of any constitutional right to *refuse* to associate with other individuals in an organization devoted in whole or part to expressive activity is much less developed.[3] The few cases are those concerning union security clauses. *Railway Employees v. Hanson*, 351 U.S. 225 (requiring association through payment of fees by employees to a union that is the employees' exclusive representative does not infringe First Amendment rights); *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-235 (expenditure by an exclusive representative of exacted

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> protected by the same principle. [*Runyon v. McCrary*, 427 U.S. 160, 176.]

See generally L. Tribe, *American Constitutional Law*, at 702 (1978).

[3] It is important to distinguish the "right of non-association" the district court relied on here from superficially similar situations in which exercise of the affirmative right to associate leads to adverse action against the person exercising that right. For example, in *Elrod v. Burns*, 427 U.S. 347, 355-56, the plurality held that requiring adherence to one political party in order to retain one's job meant that

> [a]n individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk . . . .

Thus, insofar as *Elrod* is premised on associational rights, that decision involved protection of affirmative rights and not the purely negative right to refrain from associating at all. See Gaebler, *First Amendment Protection Against Compelled Expression and Association*, 23 Boston Coll. L. Rev. 995, 996 n. 4 (1982). See also *Branti v. Finkel*, 445 U.S. 507, 514-516 (*Elrod* also based simply on protecting right to one's own "private political beliefs").

fees on political issues unrelated to collective bargaining interferes with objecting employees' First Amendment rights). *See also Lathrop v. Donohue*, 367 U.S. 820 (plurality opinion) (to require lawyers to pay fees to, but not otherwise to participate in, an organization which is involved in some legislative activity but whose "activities without apparent political coloration are many" (*id.* at 839) does not constitute "any impingement upon protected rights of association" (*id.* at 843)); *see also id.*, at 849 (opinion of Harlan & Frankfurter, JJ.) (agreeing with above, but going on to find no infringement even as to political expenditures); *but see Abood, supra*, 431 U.S., at 234 n.29 (*Lathrop* settled no constitutional question).

In none of these cases was the nature or breadth of the right to refrain from association explored in any depth, but this much is clear: the asserted right to refuse to associate is not entitled to the full measure of solicitude reserved for core First Amendment rights.[4] In *Hanson*, for example, the Court stated that the requirement financially to support the incumbent labor organization is one as to which "[t]he task of the judiciary ends

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[4] As this Court has recognized that expressive activity formerly believed to be outside the First Amendment's protections does in certain circumstances implicate the policies underlying the system of free expression, the Court has at the same time adjusted the applicable doctrinal rules to accurately reflect those aspects of First Amendment values in fact implicated so as to permit the government more easily to justify impairment of these less-central aspects of expression. *See, e.g., Young v. American Mini Theatres*, 427 U.S. 50, 70 (plurality opinion); *see also id.*, at 77 (Powell, J., concurring); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563-564 (because "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising" the government may "ban forms of communication more likely to deceive the public than inform it . . . or commercial speech related to illegal activity" and need not show as strong a governmental interest to sustantiate regulation of other forms of commercial speech); *compare Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447 with *In re Primus*, 436 U.S. 412.

once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises" (351 U.S., at 234); and in *Abood*, the Court reaffirmed its *Hanson* holding and deferential approach, despite recognition that First Amendment interests were implicated (431 U.S., at 222-223) and protests in the dissent that the nonassociational interests asserted were not accorded full First Amendment protection (*id.* at 254-55) (dissenting opinion).

Moreover, even as to the First Amendment protection accorded the right to refrain from expressive activity generally, there is relatively little doctrinal development in this Court. Again, the few cases make clear simply: (i) that there are indeed situations in which impairment of an individual's right to refrain from expressive activity so sharply conflicts with the First Amendment value of protecting freedom of belief and of personal integrity as to invalidate the complained of governmental action (*West Virginia Board of Education v. Barnette*, 319 U.S. 624; *Wooley v. Maynard*, 430 U.S. 705); but (ii) that the First Amendment protection accorded the right to refrain from government compelled expression is not simply the mirror image of the right to speak, and may not pertain in circumstances in which affirmative speech would be fully protected (*Pruneyard Shopping Center v. Robins*, 447 U.S. 74). In *Pruneyard* the Court held that no First Amendment rights of a shopping center owner are infringed by requiring him to allow his property to be used by individuals engaged in communicative activity. If, instead, the state had attempted to *forbid* the shopping center owner from allowing the use of his property by others for political speech activity and thereby supporting their message, there would be no doubt that the owner's First Amendment rights would have been infringed. *Buckley v. Valeo*, 424 U.S. 1; *First National Bank of Boston v. Bellotti*, 435 U.S. 768.

B. While this Court has not had the occasion to explore at any length the appropriate relationship between

the constitutional protection accorded association and the protection accorded a refusal to associate, the Court has in other circumstances made clear that constitutional rights are not to be mechanically read as invariably implying their obverse:

> *The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.* For example, although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, see *United States v. Kobli*, 172 F.2d 919, 924 (C.A.3d Cir. 1949) (by implication); although he can waive his right to be tried in the State and district where the crime was committed, he cannot in all cases compel transfer of the case in another district, see *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245; *Kersten v. United States*, 161 F.2d 337, 339 (C.A. 10th Cir. 1947), cert. denied, 331 U.S. 851; and although he can waive his right to be confronted by the witnesses against him, it has never been seriously suggested that he can thereby compel the Government to try the case by stipulation. [*Singer v. United States*, 380 U.S. 24, 34-35; emphasis added.[5]]

So when the Court, "follow[ing] the approach of *Singer*," determined that the Sixth Amendment's right to counsel guarantee is to be read as providing the right to proceed *pro se*, the Court stressed that "[t]he inference of rights is not a mechanical exercise" and such an "implied right must arise independently from the design and history of the constitutional text". *Faretta v. California*, 422 U.S. 806, 820 n.15.

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[5] *Singer* held that the Sixth Amendment right to trial by jury does not establish a right to a judge trial. One additional example comes readily to mind: The right to be free of cruel and unusual punishment does not imply a mirror-image right to incur cruel and unusual punishment on demand.

In this instance, the constitutional text is of little affirmative aid, since the right of association is itself implied rather than express. The principal "design" of the constitutional protection accorded free association is, however, as we have noted, clear from this Court's cases: By joining together, individuals are able to enhance the strength of their own voices, particularly as to governmental matters, and thereby to foster the free exchange of ideas the First Amendment is itself designed to foster. *Citizens Against Rent Control, supra*; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460. *See also New York Times v. Sullivan*, 376 U.S. 254, 269-70.

A supposed "right" to remain isolated from the expressive activity of others, or not to communicate at all, is wholly divorced from this central First Amendment interest. An individual who refuses to express his or her views, or to associate with others for the purpose of communicating views, is quite obviously not enhancing the full discussion of matters of public concern which it is a primary purpose of the First Amendment to promote.

Furthermore, in situations like the instant one, there is no sense in which the government's intervention imposes an official orthodoxy. Instead, the opportunity for meaningful exchange of ideas, and therefore for attaining the ideas of the First Amendment, is enhanced. *Compare West Virginia Board of Education v. Barnette, supra, with Pruneyard Shopping Center, supra.*

Here, for example, the MCCFA's position on academic policy matters is formulated by its members, not by the college administrators, and MCCFA's meet and confer representatives were, originally, chosen by the organization's members. Thus, if a nonmember does decide to join MCCFA in order to have a voice in the meet and confer process, he will, by doing so, in no way contract the public dialogue on the issues involved in academic governance. While the group may ultimately support a position with

which a dissenter disagrees, the dissenter will have the prior opportunity, within the group, to express his or her views, and the subsequent opportunity publicly to argue against the decision reached by the majority of the organization's membership.

It is, of course, true that an individual may object to the fact that through association, ideas opposed to his own may ultimately be magnified in volume and importance. But, as a general matter, the First Amendment does not countenance silencing or quieting some in order to enhance the relative voice of others. "[T]his concept contradicts basis tenets of First Amendment jurisprudence." *First National Bank of Boston v. Bellotti*, *supra*, 435 U.S., at 791 n.30. That is why, for example, this Court refused to approve a state statute providing a "right-of-reply" (*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241), and invalidated as well federal limitations on the campaign expenditures of individuals (*Buckley v. Valeo*, *supra*, 424 U.S., at 49).

In sum, governmental action that impares the ability of individuals to remain isolated from the expressive activity of others does not impair the "marketplace of ideas" which the right of free association primarily fosters. This does not, however, end the matter. The First Amendment protects not only speech and association as such, but " the broader concept of individual freedom of mind." *Wooley v. Maynard*, *supra*, 430 U.S., at 714. In those few instances in which this Court has protected the right to refrain from expressive activity, the reason has been that the government has invaded "the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control." *West Virginia Board of Education v. Barnette*, *supra*, 319 U.S., at 642; *see also Abood v. Detroit Board of Education*, *supra*, 431 U.S., at 234-235; *Elrod v. Burns*, *supra*, 427 U.S., at 356-57. We turn now to a consideration of those cases.

II.

A. It is well at this juncture to recall the context in which this case arises: Minnesota has not compelled any faculty member to become a member of MCCFA. The state has decided, however, that because MCCFA represents a majority of the faculty members, state college administrators are to consult with representatives chosen by MCCFA to hear the latter's views on academic policy matters. Clearly, the overall thrust of this scheme is to create an opportunity, that the state need not provide, for discussion of academic policy matters and, thus, to enhance such discussion. This forwards the major policy concerns underlying the First Amendment's protection of the right freely to associate with others for the expression of views.

It is claimed, however, that by its very determination to respect the decision of the majority of faculty members to associate together the government has impermissibly burdened the nonmembers' decision to remain unaffiliated. Thus, the nonmembers' complaint is that the government has made association more attractive than nonassociation by determining to hear out the enhanced, organized voice of the majority of faculty members. In effect, their argument is that the Constitution, to protect the interest in nonassociation, requires the erection of a *cordon sanitaire* preventing the government from dealing with organizations rather than individuals, or one organization rather than another.

The distortions of the proper workings of the government in a democracy entailed by this argument are sufficient to demonstrate that the First Amendment contains no such doctrine. For example, governmental entities seeking information or counsel on matters before them for decision would be precluded from seeking the views of leaders of major organizations whose members' interests are affected, unless all interested unaffiliated individuals are consulted as well. On the same reasoning, it could become unconstitutional to provide subsidies through the tax system to nonprofit organizations (*see, e.g.*, 26 U.S.C.

§ 501(c)(3)), or to provide governmental grants to certain nonprofit organizations of various types but not to others, or to organizations but not to individuals (*see, e.g.*, 42 U.S.C. §§ 2996e, f(c)).

In a society which has been, from de Tocqueville's day to ours, infused with the energies of private organizations, the theory that the government may not have any dealings with organized groups of its citizens where unaffiliated individuals protest is unworthy of serious consideration. The effect of erecting such a barrier between the government and private organizations would be to read into the free speech clauses of the First Amendment an analogy to the neutrality requirement of the religion clauses. But this Court has expressly held this analogy to be "patently inapplicable" (*Buckley v. Valeo*, *supra*, 424 U.S., at 92), and therefore upheld public support for some but not all political parties as an "effort . . . not to abridge, restrict, or censor speech, but rather to use public money to facilitate an enlarged public discussion [and therefore to] further [] First Amendment values (*id.*; see also *Storer v. Brown*, 415 U.S. 724).

Indeed, the district court's April 5, 1983 order, which was entered to effectuate its basic decision, provides a vivid demonstration of how its over-blown nonassociation theory tends to destroy not only the government's ability to operate in a rational manner in its consultative activities and in allocating other benefits but also the true right of association as stated by this Court. That order conditions the government's beneficial dealings with private organizations on opening up the association's internal decision making process to nonmembers. This command is irreconcilable with the First Amendment:

> [T]he freedom to associate . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only. [*Democratic Party of United States v. Wisconsin ex rel LaFollette*, 450 U.S. 107, 122.

See also Rodriquez v. Popular Democratic Party, 457 U.S. 1, 14.]

To compel MCCFA to forego its freedom to limit participation in its deliberations to its members in order to avoid putting nonmembers to a choice between their desire to remain unaffiliated and their desire to be heard by the government is directly to infringe upon associational interests in order to protect against an indirect, remote impact upon nonassociational interests.

B. *Regan v. Taxation with Representation*, *supra*, we submit, confirms the analysis to this point. The Court there decided that, even where *affirmative* interests in expression are asserted, Congress does not impermissibly infringe upon those interests simply by favoring some speech over other speech, as long as the legislature's aim is not to suppress certain ideas:

> [The suggestion] that strict scrutiny applies whenever Congress subsidizes some speech, but not all speech . . . is not the law. Congress could, for example, grant funds to an organization dedicated to combatting teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures. Under *Cammarano v. United States*, [358 U.S. 498], such a statute would be valid. Congress might also enact a statute providing public money for an organization dedicated to combatting teenage alcohol abuse, and impose no condition against using funds obtained from Congress for lobbying. The existence of the second statute would not make the first statute subject to strict scrutiny.
>
> Congressional selection of particular entities or persons for entitlement to this sort of largesse "is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find. *United States v. Realty Co.*, [163 U.S. 427,] 444 [(1896)]." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937). . . . As

> we said in *Maher* [*v. Roe*, 432 U.S. 464], "[c]onstitutional concerns are greatest when the State attempts to impose its will be force of law . . . ." 432 U.S., at 476. Where governmental provision of subsidies is not "aimed at the suppression dangerous ideas," *Cammarrano, supra*, at 513, its "power to encourage actions deemed to be in the public interest is necessarily far broader." *Maher, supra*, at 476. [*Regan v. Taxation with Representation, supra*, 51 L.W., at 4585-86.]

On this basis the Court concluded that Congress could permissibly subsidize by a tax exemption lobbying by veterans' organizations but not lobbying by other non-profit organizations. And the *Regan* Court's reliance on *Maher v. Roe* confirms that the principle declared in the foregoing passage is not limited to tax exemptions but applies to governmental benefits generally.

Regan's reasoning is dispositive here unless the outcome there would have been different if the constitutional claim had been framed in terms of the putative nonassociational rights of nonmembers of veterans' organizations. But the claim of infringement of nonassociational interests through the indirect sort of governmental "inducement" to associate found here is weaker, not stronger, than the claim of government interference with affirmative speech interests rejected in *Regan*.

First, the concept of governmental interference with freedom of belief supposes direct governmental compulsion, and not simply some action by the government which may influence an individual's decision whether to entertain certain ideas. For, as the Court has recognized, governmental "officials may foster [ideological views] by persuasion and example," (*West Virginia Board of Education v. Barnette, supra*, 319 U.S., at 640); *see also Wooley v. Maynard, supra*, 430 U.S., at 717 (the government may seek to communicate "an official view as to proper appreciation of history, state pride, and individualism"; what the government may not do is to force citizens into

"becoming the courier for such a message"). Thus, only where "compulsion [is] employed [as] . . . a means for [the] achievement" of the government's purpose can it be claimed that there has been an intrusion into one's personal beliefs of constitutional magnitude. *Barnette, supra*, 319 U.S., at 640. *See also First National Bank v. Bellotti, supra*, 435 U.S., at 794 n.34.

Second, the freedom to believe as one wishes is most sharply compromised where the very purpose of the government *is* a didactic one of promoting a certain point of view. *Barnette, supra*; *Wooley, supra*. Where, as here, the government instead has another purpose—and particularly where that purpose is itself consonant with promoting a robust dialogue on issues of public concern—the claim that the government seeks to control one's thoughts, and the likelihood that any individual will in fact feel that his or her personal integrity is under seige, lacks a basis in reality. *Pruneyard Shopping Center, supra*, 447 U.S., at 87.

Third, the claim of an invasion of a First Amendment right to freedom of belief is at its strongest when the governmental intrusion is itself direct and intimate, as was the requirement in *Barnette* that children rise on tehir own two feet and utter government prescribed thoughts out of their own mouths. Thus, "the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate." *Wooley, supra*, 430 U.S., at 715. While that difference proved to be "essentially one of degree" in a context in which the government's primary interest was precisely in promoting an official orthodoxy, such a difference becomes one of kind where the government has no such didactic interest and the connection between the individual and the compelled message or association is attenuated. *Pruneyard Shopping Center, supra*. This, presumably, is why tax payers generally cannot claim impairment of their rights of non-

association because some of their tax monies are paid through government grants to organizations of which they disapprove. It is also why the nonmembers who decide to remain nonmembers cannot claim impairment of their nonassociational rights because MCCFA is recognized in the meet and confer process.

Finally, as we have seen (pp. 12-15, *supra*), the claim of a nonassociational right often arises precisely where the government action enhances the associational rights of others, thereby expanding, rather than contracting, the "marketplace of ideas." In such instances, unlike those in which governmental impairment of freedom of belief has been found, "[t]he freedom asserted by these appellees does . . . bring them into collision with rights asserted by . . . other individual[s]." *Barnette*, *supra*, 319 U.S., at 630.

In sum, both the freedom of belief underpinnings of the nonassociational interest concept and the competing "marketplace of ideas" value which inheres in the affirmative associational right protected by the First Amendment counsel that only where the governmental action is (1) compulsory, (2) based on a didactic purpose, (3) affects individuals directly and intimately, and (4) fails to enhance the opportunity for association for expression by some groups without suppressing particular points of view disfavored by the government is such action open to strict scrutiny. Where, as here, the plaintiff fails to show any of these factors the government's power to allocate benefits among citizens and groups recognized in *Regan* must (assuming, of course, a rational basis for the exercise of that power) prevail.

CONCLUSION

For the above-stated reasons, the judgment below should be reversed.

Respectfully submitted,

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